***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 76-1356

To be argued by
SHEILA GINSBERG

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

MARIO CAICEDO,

Defendant-Appellant.

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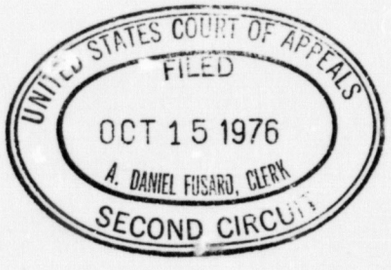
Docket No. 76-1356

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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# BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## QUESTION PRESENTED

Whether Judge Costantino's refusal to permit the defense to use public records to establish appellant's alibi is error mandating reversal.

## STATEMENT PURSUANT TO RULE 28(a)(3)

### Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino, District Judge) rendered May 7, 1976, after a jury trial, convicting appellant Caicedo of possession with intent to distribute (Count One) and the actual distribution (Count Two) of one-eighth kilogram of cocaine. Appellant was sentenced to concurrent four-year terms of imprisonment to be followed by a five-year term of special parole.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

### Statement of Facts

Appellant was charged[1] with violating 21 U.S.C. §841(a)(1) by his possession on April 30, 1974, with intent to distribute (Count One) and distribution (Count Two) of one-eighth kilogram of cocaine. The prosecution contended that appellant

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[1]The indictment is B to the separate appendix to appellant's brief.

was the person who, some twenty months prior to the trial, had actually sold the cocaine to undercover agent Cruz Cordero in Brooklyn, New York. The defense to the charge was that appellant could not have been the man identified as the seller because he was not present in this country at the time of the transaction. Specifically, the defense maintained that appellant had been deported some time prior to the sale and had not returned to the United States until two months after the sale.

A. The Government's Case

Agent Cordero claimed that on April 30, 1974, he was introduced to appellant by a confidential informant in parking lot of Wetson's on Empire Boulevard in Brooklyn[2] (Transcript of January 15, 1976, at 30-31[3]). Cordero asserted that the meeting occurred at approximately 2:00 p.m.[4] and that, after a brief introduction, the person identified as appellant told

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[2]Cordero identified appellant in court as the man he met almost 2 years earlier. The record does not reveal whether this was the first time Cordero identified appellant or whether there had been any pre-trial identification procedure.

[3]Numerals preceded by a date refer to pages of the trial transcript of that date.

[4]On cross-examination, Cordero described as a "typographical error" the notation in his report that the meeting had occurred at 4:30 p.m.

Cordero that he had a sample of cocaine with him but that the package Cordero wanted to purchase was elsewhere (Transcript of January 15, 1976, at 34). Cordero, the informant, and the seller then got into the seller's car, a brown Ford, and drove to 480 East 23rd Street in Brooklyn. Cordero testified that the seller gave Cordero the cocaine sample during the ride. Once inside Apartment 1-A at the 23rd Street address, the seller gave Cordero a package containing one-eighth kilogram of cocaine. In exchange, Cordero gave the seller $3,000[5] (Transcript of January 15, 1976, at 41-44). Before the three men left the apartment, the seller, according to Cordero, gave him a matchbook cover on which wrote the word "Mario" and a telephone number in the event Cordero wanted to make a further deal[6] (Transcript of January 15, 1976, at 48-49). The entire transaction took approximately forty-five minutes (Transcript of January 15, 1976, at 65). Cordero never contacted the seller again (Transcript of January 15, 1976, at 61).

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[5]The seller also gave the informant some cocaine. The drugs were introduced into evidence, and Jeffrey Weber, a forensic chemist employed by the Drug Enforcement Administration, testified that the packages contained cocaine hydrochloride and lactose (Transcript of January 15, 1976, at 110-115).

[6]The matchbook cover was introduced into evidence as Government Exhibit #4.

Special Agent Robert P. Jones testified that on April 30, 1974, at 2:00 p.m. in a Wetson's parking lot he observed Agent Cordero and the confidential informant meet a person Jones identified as appellant (Transcript of January 15, 1976, at 88). Jones saw the three men get into a brown Ford automobile bearing the license number 777 ZAN. Jones, in his own car, followed the brown Ford to 480 East 23rd Street, where the three men entered the building, remained inside for twenty minutes, re-entered the Ford, and returned to Wetson's (Transcript of January 15, 1976, at 89).

According to Agent Jones, his surveillance of the person he identified as appellant lasted for thirty-five to forty minutes (Transcript of January 15, 1976, at 94). Jones had never seen this person before April 30, 1974, and he did not see him thereafter (Transcript of January 15, 1976, at 103). On April 15, 1975, he arrested appellant for the April 30, 1974,[7] drug charge (Transcript of January 15, 1976, at 104).

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[7]While there was no formal Simmons hearing to challenge, on grounds of taint, the in-court identification of appellant, the record indicates that such a hearing would have been appropriate. During the defense case Jones admitted to having examined the Immigration and Naturalization Service file (Transcript of January 16, 1976, at 18), presumably some time between April 30, 1974, and appellant's arrest. That file contains several photographs of appellant. The Immigration and Naturalization Service file has been docketed and made part of the record on appeal. See infra at 6.

Benjamin Feinstein, the owner of Economy Car Rental, testified that a brown Ford Galaxie was rented by a man named Mario Caicedo on April 26, 1974, and returned on May 3, 1974 (Transcript of January 15, 1976, at 121-122). Joseph McNally, a handwriting analyst, testified that he compared the car rental form with handwriting samples given by appellant and concluded that the same person had signed both the rental form and the sample (Transcript of January 15, 1976, at 138-139).

B. The Defense Case

The defense maintained that appellant could not have been the person who sold cocaine to Agent Cordero in the April 30, 1974, transaction because appellant had been deported some nine months prior to that date and did not return to the United States until July 3, 1974. As proof of absence from the country during the critical period, the defense sought to introduce the United States Bureau of Immigration and Naturalization file (No. A1 945 7802) on appellant. The file contained, inter alia:[8]

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[8]The file, marked as Defendant's Exhibit B for identification, has been docketed as part of the record on appeal.

(1) Deportation Case Check Sheet (Form #1-170). This document reflected that appellant's case was closed on August 6, 1976, due to his voluntary departure from New York City to go to Colombia. (The form is annexed as Exhibit D-1 to appellant's separate appendix).

(2) A November 28, 1973, memorandum concerning cancellation of collateral bonds. This memorandum from Maurice F. Kiley, Deputy District Director of Immigration for New York City, directed that the bond put up for alien Mario Caicedo had been cancelled and that the collateral could be refunded. (The memorandum is annexed as Exhibit D-2 to appellant's separate appendix).

(3) Notice of Immigration bond cancellation dated August 6, 1973. The notice was addressed to Gertrude Sylvester and stated, in pertinent part:

> The conditions of the above described immigration bond have been fulfilled as to the above named alien and you are no longer liable under the bond.

A legend stamped across the notice reads: "Deportation." (The notice is annexed as Exhibit D-3 to appellant's separate appendix).

(4) An April 8, 1974, letter from the New York City Department of Income Maintenance requesting information as to Mario Caicedo's present location. The reply from the Immigration and Naturalization Service entered on the letter provided:

THE RECORDS OF THIS SERVICE REFLECT THAT
MARIO CAICEDO CABEZAZ DEPARTED FROM THE
U.S. TO COLOMBIA ON 8-6-73.

(The letter is annexed as Exhibit D-4 to appellant's separate appendix).

(5) $1,000 Immigration bond signed by Gertrude Sylvester for Mario Caicedo. The bond reflects that Mario Caicedo arrived in the United States at El Paso, Texas, on July 3, 1974. (The bond is annexed as Exhibit D-5 to appellant's separate appendix).

On the prosecutor's objection, Judge Costantino refused to admit the file into evidence on the grounds that counsel, having failed to offer the testimony of the Bureau of Immigration custodian of the file, had not laid a proper foundation for its admission (Transcript of January 16, 1976, at 12-14). The judge adhered to this ruling despite the fact that there was no dispute as to the authenticity of the file.[9] Throughout the trial the file had been in the custody of the Assistant U.S. Attorney, who had obtained it from the Department of Immigration[10] (Transcript of January 16, 1975, at 15).

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[9]Trial counsel offered to "stipulate under oath" that this was the file he obtained in response to his subpoena and the prosecutor conceded on the record that the file offered was the file of the Bureau of Immigration and Naturalization (Transcript of January 16, 1976, at 12).

[10]Prior to trial the Assistant U.S. Attorney provided counsel with selected portions of the file (Transcript of January 15, 1976, at 7-8). In response to a defense subpoena, the prosecutor turned over the remainder of the file on the morning of the defense case (Transcript of January 16, 1976, at 8).

Moreover, the judge, apparently because he did not perceive the significance of some of the entries in the file,[11] rejected counsel's representation that the file was critical to the defense, and refused counsel's request for an opportunity to subpoena the custodian of the file in order to meet the court's demand that an Immigration officer be present (Transcript of January 16, 1976, at 16).

Thwarted in his efforts to introduce the entire file, counsel persisted in his attempt to present documentary proof of deportation by concentrating on the introduction of the Bureau's response to the Welfare Department's request for information concerning appellant's whereabouts (Exhibit D-4 to appellant's separate appendix). In the face of repeated objections by the prosecutor and the court, counsel unsuccessfully attempted to lay a foundation for the document's admission through the testimony of Agent Jones, who counsel mistakenly believed could be sufficiently familiar with the

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[11]At one point Judge Costantino said of the file:

> ... It has no materiality to this case whatsoever.
>
> (Transcript of January 16, 1976, at 13).

Subsequently, he said:

> It [the file] has no probative value in this case.
>
> (Transcript of January 16, 1976, at 15).

document to testify as to its contents (Transcript of January 16, 1976, at 16-26).

After these efforts failed, Judge Costantino suddenly recognized that the document, concededly part of the Immigration file, was a public record, and therefore admissible under §803(8) of the Federal Rules of Evidence (Transcript of January 16, 1976, at 27). Then, although he directed the prosecutor to stipulate to its admission, the Judge instructed the jury that the document had no probative value (Transcript of January 16, 1976, at 28-29). Specifically, the judge instructed:

> We have received that piece of paper as follows, in order to facilitate: The Government will stipulate that piece of paper, without having someone from the Immigration office to identify that, it is part of an official file.
>
> Number two, the Government does not [sic] stipulate to its admission but does not concede that whatever is placed on that piece of paper is true.
>
> Thirdly, that the piece of paper that is going into evidence is a piece of paper that was mailed from the Welfare Department to the Immigration Service. It wasn't as a result of the Immigration Service having an interview with anyone. So those are the three stipulations and no concessions as to that.
>
> Transcript of January 16, 1976, at 29-30).

When counsel objected to this limitation and requested that the jurors be told that they were to determine the weight of this evidence, the judge further instructed:

> They could look at it. It is neither proof that he did leave the country or he never left the country; neither proof either way.
>
> Transcript of January 16, 1976, at 30.

The defense presented the testimony of Sylvia McAllan, a woman who had known appellant for eight years. Appellant and Ms. McAllan are lovers, and at the time of the trial Ms. McAllan was pregnant with appellant's child. Ms. McAllan testified that some time in July or August 1973 she accompanied appellant to Kennedy Airport where she saw him get on a plane to Colombia. Ms. McAllan did not see appellant again until July 1974 (Transcript of January 16, 1976, at 31-33).

On cross-examination, the prosecutor sought to impeach Ms. McAllan's credibility with the fact that she loved appellant and therefore, inferentially, would lie for him (Transcript of January 16, 1976, at 35).

C. The Government's Rebuttal

Special Agents Thomas Lentini and John Andrejko testified as to their surveillance of the April 30, 1974, transaction, and each identified appellant as the man who met Agent Cordero and the confidential informant in Wetson's parking lot on that day (Transcript of January 16, 1976, at 39-40, 52). On cross-examination it was established that neither agent had previously seen the man they identified as appellant and that they did not

see him after April 30, 1974 (Transcript of January 16, 1976, at ). They both admitted that their observations were made from across a busy thoroughfare at a distance of about 150 feet (Transcript of January 16, 1976, at 44, 59). Moreover, between the time of their observations and the trial, Agent Andrejko admitted being involved in fifty to seventy-five other drug investigations, and Agent Lentini admitted to "more than twenty" (Transcript of January 16, 1976, at 49, 57).

In his summation to the jury, the prosecutor, in an attempt to denigrate the defense, summarized the evidence presented as follows:

> ... He [appellant] has a story about what happened here and his story, he couldn't possibly have sold this heroin [sic] that you see right before you because he wasn't in the United States, purportedly, he'll have you believe that he left the United States some time in July of 1973 and he didn't return until July of 1974. How did he try to tell you that is the case, they put one witness on the stand, Mrs. Sylvia McAllan, that was the only witness.
>
> Transcript of January 16, 1976, at 69-70).

Defense counsel's objection produced the following reaction from Judge Costantino:

> You can't tell us what we can't talk about in comparison to others that were called.
>
> Transcript of January 16, 1976, at 71. [emphases added]

In his charge to the jury on the alibi defense, Judge

Costantino, by reference to only Ms. McAllan's testimony, incorrectly reinforced the impression that there had been no documentary evidence of deportation (Transcript of January 16, 1976, at 101).

After deliberations, the jury convicted appellant on both counts (Transcript of January 16, 1976, at 111).

## ARGUMENT

### JUDGE COSTANTINO'S REFUSAL TO PERMIT THE DEFENSE TO USE PUBLIC RECORDS TO ESTABLISH APPELLANT'S ALIBI IS ERROR MANDATING REVERSAL.

At trial, the defense presented an alibi to the charge that appellant was the person who made the April 30, 1974, cocaine sale to Agent Cordero. Throughout, appellant maintained that he could not have been in Brooklyn at the site of the crime on April 30, 1974, because he had previously been deported to his native Colombia, South America, and he did not return to the United States until July 3, 1974.

To establish appellant's absence from this country during the critical period, defense counsel sought to introduce the United States Bureau of Immigration and Naturalization file (No. A19457032) on appellant. That file contained documentary evidence of the fact that appellant had been voluntarily deported on August 6, 1973, and did not return to the United States until July 3, 1974. Specifically, the file contained (1) an entry that appellant had voluntarily departed New York City for Colombia on August 6, 1976 (see Exhibit D-1 to appellant's separate appendix); (2) a memorandum dated November 28, 1973, directing that the $1,000 bond that had been posted for appellant when he entered the United States could be cancelled (see Exhibit D-2 to appellant's separate appendix); (3) a record of the bond cancellation stamped with the word

"deportation" (see Exhibit D-3 to appellant's separate appendix); and (4) an April 8, 1974, reply to an inquiry from the New York City Department of Income Maintenance that explicitly stated:

> THE RECORDS OF THIS SERVICE REFLECT THAT MARIO CAICEDO CABEZAZ DEPARTED FROM THE U.S. TO COLOMBIA ON 8-6-73.

(See Exhibit D-4 to appellant's separate appendix).

The file also contained a record of the issuance of another $1,000 bond for appellant, who had, the bond asserted, re-entered the country at El Paso, Texas, on July 3, 1974 (Exhibit D-5 to appellant's separate appendix).

Despite the obvious probative value of these entries in the file, Judge Costantino, on the prosecutor's objection, refused to allow it into evidence. The rationale for the exclusion was two-pronged: the judge ruled that (1) trial counsel, having failed to subpoena the Immigration Service custodian of the file, had not laid the proper foundation for the file; and (2) the material in the file was not probative of the alibi. This ruling was fundamental error mandating reversal.

The file, a record of an agency of the United States Government, is admissible into evidence under the Public Records exception to the hearsay rule. Section 803 of the Federal Rules of Evidence provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *

> (8) Public records and reports. -- Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Like the records of the Selective Service System and the U.S. Bureau of Prisons, the records of the Bureau of Immigration and Naturalization are public records within the meaning of the statute. United States v. Simmons, 476 F.2d 33, 36 (9th Cir. 1973); Ellis v. Capp, 500 F.2d 225, 226 (5th Cir. 1974); see also United States v. Ghaloub, 385 F.2d 567 (2d Cir. 1966). As such, so long as there is no dispute as to authenticity -- here, the prosecutor conceded that defense counsel was offering the original Immigration file[12] -- no custodial witness is necessary in order to introduce the evidence. United States v. Simmons, supra; Weinstein's EVIDENCE, Vol. 4, §803(8)[010 at 803-173 (1975). Indeed, Judge Costantino acknowledged as much when he subsequently allowed the introduction of the Bureau of Immigration reply

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[12] Counsel offered to "stipulate under oath that he had subpoenaed the file. He also asked for time to subpoena the custodian.

to the Welfare Departmen s inquiry (see Exhibit D-4 to appellant's separate appendix).

Unfortunately, this belated admission did not cure the error. As an initial matter, appellant was entitled to rely on all the documents -- at least four more in number -- that support his position. Moreover, Judge Costantino's limiting instruction which accompanied the admission was grossly incorrect and necessarily nullified the effect of the admission.

Over defense counsel's objection, the judge told the jury that the exhibit was not evidence that appellant had ever left the country. Specifically, he commented:

> ... It is neither proof that he did leave the country or he never left the country; neither proof either way.[13]
>
> Transcript of January 16, 1974, at 30.

This instruction coupled with his earlier comments that nothing in the file was relevant to this case virtually compelled the jurors' mistaken belief that there was no documentary proof that appellant had left the United States.

Not only was the exhibit (as well as the other evidence in the file) proper evidence that appellant had voluntarily departed the country on August 6, 1973 (Hara v. United States, 505 F.2d 495 (9th Cir. 1974), cert. denied, 95 S Ct. 1138), it was also probative on the defense contention tha appellant was still out of the country on April 30, 1974. Once the defense established departure, it was entitled to draw the

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[13]The prosecutor's summation, reeinforced by the judge's instruction, further ensured that the jury would not consider this evidence.

inference that appellant remained outside the country. See Noell v. United States, 183 F.2d 334, 338 (9th Cir. 1950). This is especially true in light of the assertions in the immigration file that support the fact of re-entry in July of 1974.

Of course, to prevail, an alibi defense need not be proven beyond a reasonable doubt, but need only sustain a reasonable doubt about the prosecutors' case. United States v. Burse, 531 Fd. 1151, 1153, (2d Cir. 1976); United States v. Coughlin, 514 Fd. 904 (2d Cir. 1975). On this record, it is likely that the alibi would have resulted in an acquittal.

All the eyewitness testimony was highly impeachable because it related to a single incident which occurred almost 2 years prior to trial. None of the agents had seen the seller prior to April 30, 1974 and none saw him after the sale. Moreover, the surveillance officers had only observed the seller briefly, and from a distance of 150 feet. In addition, there was the possiblity that Agent Jones's identification was tainted by pretrial exposure to the photographs in the Immigration file. See Braithwaite v. Mason, 527 F.2d 363, (2d Cir. 1975), cert. granted, 96S Ct. 1737 (1976).

This court has properly recognized the fallibility of eye-witness identification United States v. Fernandez 456 Fd. 638, 644 (2d Cir. 1972). See also WALL, EYE - WITNESS IDENTIFICATION IN CRIMINAL CASES, 6, 10 (1967).

The government's handwriting evidence does not materially change this analysis. United States v. Evans, 484 Fd. 1178 (2d Cir. 1973)

and its subsequent history (see Braithwaite v. Manson Supra 527 Fd. at 369 n.11) is particularly relevant in this regard. In Evans, as here, the prosecutor bolstered its eye-witness identification with the testimony of a handwriting expert who asserted, unequevocally, that Evans was the culprit. Two years after conviction the government conceded that both the identification and the handwriting analysis had been wrong and that Evans was indeed innocent.

In the trial below whether appellant was the man who sold drugs to Cordero was a question of fact for the jury to determine. Toward that end appellant had the right to adequately present his alibi defense and refusal to permit him to do so is an error mandating reversal United States v. Alfonso-Perez, 531 F. 2d, 362, 1364-5 (2d Cir. 1976).

## CONCLUSION

For the foregoing reasons, the judgement of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Oct 15, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Gail Gerstein